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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 311

CHARLES D. OFFHOUSE, ET AL.,
Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON, IN THE COUNTY OF PASSAIC,

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

John F. Evans,
HAROLD D. GREEN,
SAUL R. ALEXANDER,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

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No. 311

CHARLES D. OFFHOUSE, ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON, IN THE COUNTY OF PASSAIC,

Appellee.

STATEMENT BY APPELLEE OPPOSING JURISDICTION, WITH MOTION TO DISMISS, AND IN THE ALTERNATIVE MOTION TO AFFIRM.

The Appellee states the following matters and grounds against the jurisdiction of this Court, as asserted by the Appellant herein in his statement of the basis of the Appellate jurisdiction, filed herein on the third day of July, 1944, as required by Rule 12, Paragraph 3 of this Court.

This appeal challenges the right of a Board of Education to abrogate or rescind a salary increment schedule on the theory that once having been adopted, an irrepealable contract was created by virtue of the New Jersey Tenure Law.

The opinion of the New Jersey Supreme Court is officially reported in 131 N. J. L. 391, affirming the decisions of the New Jersey State Board of Education, and the Commissioner of Education, reported at pages 77-87 and 65-74 of the record below, respectively.

I.

The Federal question was not properly "raised" in the State Courts. Pursuant to the applicable State Statute, this proceeding was commenced by a petition of appeal (pages 18-29 from record below) to the Commissioner of Education. It was alleged that Appellee had violated the provisions of the State Tenure Law which inhibited against reducing salaries of tenure teachers. No charge was made, not even a suggestion, that a contract was involved, nor that a Federal question was to be determined. A breach of Article 1, Section 10, of the Federal Constitution does not appear either in the pleadings, the record, argument of counsel, nor memoranda filed with the trial court. No request to rule on this question was presented to the Commissioner and his determination made no mention thereof. Appellants conceded that no contract was involved in acknowledging and admitting the right of the Legislature to effect changes in salary, even if in so doing it proved disadvantageous to tenure teachers.

The Federal question was not raised, nor relied upon in the first New Jersey tribunal, which had jurisdiction to decide it. There is no law which prohibits a statutory tribunal from passing on constitutional questions of recent enactment. To assume that the Commissioner would have declined to do so is unwarranted and of no consequence. The question should have been advanced if Appellants intended to rely thereon.

On appeal to the State Board of Education, Appellants reaffirmed their position before the trial court, and, in addition, for the first time alleged the Federal question. The appeal was determined on the record below and affirmed on the State issues. The Appellate Court declined to adjudicate the Federal question, it not being necessary for a determination of the cause (pages 79-87 from record below).

In the application to the Supreme Court, all previous grounds were reasserted and the Federal question was projected (pages 2-9 from record below). There was an affirmance on the State issues and a ruling on the Federal question that no contract was impaired because none existed.

The theory on which a cause has been tried must be adhered to on appeal and the Appellate Court will normally refuse to consider questions which have not been raised below. *Reidy* v. *Myntti,* 116 F. (2nd) 725. Litigants must not have the opportunity or incentive to obtain an appellate reversal on grounds that were not disclosed at the trial. *New York Life Ins. Co.* v. *Calhoun,* 114 F. (2d) 526.

The constitutional question must be seasonably and sufficiently drawn in question in order to meet the jurisdictional requirements of the Judicial Code. It cannot as here be merely incidental.

II.

The State Court decision was not based on the determination of the Federal question. The theory of the Appellee in justification of its refusal to grant increments was that these increases in salary under the schedule were by its rules not automatic in its operation, but conditioned upon a recommendation for an increase both by the Superintendent of Schools and the Committee on Education (page 69 of record below—Post Appendix A); that since no such recommendations had been made since 1932, and no increases under the schedule had in fact been given and this practice had been acquiesced in by the Appellants over a period of nine years, that the schedule had become inoperative and no longer in force and effect; that the State Law R. S. 18:13-5 (Post Appendix B), which is the authority for adopting a salary schedule, specifically provides that "a board may from time to time change, amend or repeal such rules and regulations", and that pursuant to this provision, Appellee, by

formal resolution (Post Appendix E), on October 14, 1937, rescinded the salary schedule. This resolution was designed to occupy the whole field embraced by the earlier rule, and so as a substitute therefor (New Jersey Supreme Court Decision), Appellants countered with the argument that "satisfactory service," and not a recommendation, was the condition precedent for an increase; that the increments under the schedule were automatic; that the quoted provision from the rules governing the employment under R. S. 18:13-5 were not applicable to Appellants who had acquired tenure.

The trial court ruled on and determined each of these contentions against Appellants (pages 65-74 from record below). The State Board and the Supreme Court successively affirmed these findings of the trial court. Issues other than the Federal question were necessarily involved in this controversy. The decisions of the State Courts were predicated upon grounds which did not embrace the Federal question. The determination was, that even if a contract was involved, the provision of the State Statute, which permitted change, amendment or repeal, was incorporated in the contract, and became an integral part thereof. That determination disposed of the controversy without recourse to the Federal question. That the State Courts so viewed the determination is exemplified by the fact that they did not find it necessary, and, consequently, refrained from ruling on the defenses of laches, waiver, estoppel, acquiescence and contribution, asserted by Appellees.

The determination that according to the rules and regulations of Appellee, a recommendation for an increase was a necessary condition precedent to an increase, of itself, and without more, made it unnecessary to determine the Federal question, even if it had been properly presented. See *S. W. Bell Tel. Co.* v. *Oklahoma,* 303 U. S. 206; *De Saussure* v. *Gaillard,* 127 U. S. 216; *Johnson* v. *Risk,* 137

U. S. 300; *Wood Moving & Reaping Machine Co.* v. *Skinner*, 129 U. S. 293.

On appeals from State Courts' judgments, where it appears that notwithstanding Federal question, judgment rests on adequate non-federal ground, and hence would not be affected by the Supreme Court's decision on Federal question, appeal will be dismissed. *U. S.* v. *Hastings*, 296 U. S. 188; *Williams* v. *Oliver*, 53 U. S. 111.

It does not appear from the record that a Federal question "was necessarily involved in the decision; and that the State Court could not have given the judgment or decree, which they passed, without deciding it." *Armstrong* v. *The Treasury of Athens County*, 41 U. S. 279. Therefore, it is a matter of no consequence to this Court that the State court may have gone further and decided a Federal question. *Moore* v. *Mississippi*, 88 U. S. 636. Where a case in this Court can be decided without reference to any question arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. *Silver* v. *L. & N. R. R. Co.*, 213 U. S. 175.

This Court does not decide "questions of a constitutional nature, unless absolutely necessary to a decision of the case." *Burton* v. *United States*, 196 U. S. 295.

The Federal question was only incidental. The independent ground is broad enough to sustain the decision.

The State Courts' opinions indicate that they construed the resolution of October 14, 1937, as being a valid exercise of the authority vested in it by the State's Statute to "change, amend or repeal" its own rules and regulations. These opinions involved purely a matter of local law. A Federal question was not decided by the State Court, nor was its decision necessary to a determination of the cause.

Thus, not only has this Court the interpretation placed

upon a local law, the salary schedule of Appellee by its State Courts, but it also has the construction by the State Courts of comparable statutes in dealing with similar salary schedules adopted by other local Boards of Education. In *Greenway* v. *State Board of Education of Camden*, 129 N. J. L. 46, the New Jersey Supreme Court held that a Board of Education could amend, rescind or abolish a salary schedule and that this action "did not constitute the impairment of any contractual rights." In 129 N. J. L. 461, at page 464, the Court of Errors and Appeals in affirming, and ruling against the contention that the Camden salary schedule covers not alone the current salary, but extends as well to all future increases, said: "This would mean that the action of one Board providing for salary increases *in futuro* would bind all its successors. The statute is not so framed. The Legislature has not invested the local courts with contractual power of such sweep. Such an interpretation would constitute a palpable distortion of the letter and spirit of the enactment." See *Liva* v. *Board of Education of Lyndhurst*, 126 N. J. L. 221.

Such interpretation by the New Jersey Courts of a State Statute will be accepted by this Court and does not raise a Federal question properly reviewable by this Court. *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660; *Carstairs* v. *Cochran*, 193 U. S. 10; *Tampa Waterworks Company* v. *City of Tampa*, 199 U. S. 241; *Quong Ham Wah Company* v. *Industrial Accident Company*, 225 U. S. 445; *Terrace* v. *Thompson*, 263 U. S. 197; *Supreme Lodge, etc.* v. *Meyer*, 265 U. S. 30; *American Ry. Express Co.* v. *Commonwealth of Kentucky*, 273 U. S. 269.

In *Bachtel* v. *Wilson*, 204 U. S. 36, this Court held that before it can pronounce a judgment of a State Court to be "in conflict with the Federal Constitution, it must be made to appear that its decision was one necessarily in conflict therewith, and not that possibly, or even probably, it was."

It is respectfully submitted that jurisdiction should be declined because a Federal question of substance was neither presented to, nor decided by the State Court, nor was a Federal question necessary to the determination of the cause.

III.

The Federal question is not substantial. The subject matter of the controversy is not inherently Federal. The question must be sufficiently substantial to support the appeal in order to sustain jurisdiction. *Zucht* v. *King*, 260 U. S. 174.

A Federal question may have been so explicitly foreclosed by prior decisions as to afford no basis for a Writ of Error. *Leonard* v. *Vicksburg R. Co.*, 198 U. S. 416.

The fundamental issue involved is whether the relationship between a teacher and his employing board under New Jersey Law established a contract within the meaning of the Federal Constitution. It has been resolved in the negative both by the State Courts and this Court.

A contract must exist before it can be impaired. It is not necessary to consider the effect or validity of either the resolution complained of, or the action taken thereunder, unless and until Appellants have established a contract right.

Appellants pose a fictitious Federal question which is devoid of merit and unsubstantial because it is concluded by previous authority. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102.

The contention of Appellants that their employment constitutes a contract is derivative from the so-called Tenure Law of New Jersey, the pertinent provisions of which appear in Section 1 of Chapter 243 of the Laws of 1909, now Sections 18:13-16 and 18:13-17 of the Revision of 1937 (Post Appendix C & D). It has been held that these pro-

visions confer upon teachers and principals in the appointed category, a mere "legislative status" subject to legislative alteration and annulment, and does not give rise to an irrepealable legislative contract. *Greenway* v. *Board of Education of Camden, supra.*

That the Tenure Law of New Jersey creates no contract has been recognized and determined by the State's highest Court consistently in sustaining lower Court decisions. *Redcay* v. *State Board of Education,* 130 N. J. L. 369; aff'd 131 Id. 326. It was similarly construed by this Court in *Phelps* v. *Board of Education of West New York,* 300 U. S. 319, in affirming both the Court of Errors and Appeals, 116 N. J. L. 412, and the Supreme Court of New Jersey, 115 Id. 310.

Neither *Gowdy* v. *State Board of Education,* 84 N. J. L. 231, aff'd 85 N. J. L. 726, nor *Weber* v. *Board of Education,* 127 N. J. L. 279, relied upon by Appellants as authority for the proposition that the adoption of a salary schedule creates an irrepealable contract within the purview of the Federal Constitution so as to guarantee prospective salary increments, so hold. In the former case, the determination was that there had been a violation of the State Statute prohibiting reductions from "base" salary. The Federal question was not involved. The latter case decided that increases under a salary schedule which was in force and effect, and which had "accrued" and become vested, were beyond recall. It did not, however, deny the right to refuse prospective increments. These decisions are consistent and not in conflict with the decisions of the State Courts cited by Appellee.

The New Jersey Court of Errors and Appeals held in *Greenway* v. *Board of Education of Camden, supra,* and the New Jersey Supreme Court similarly held in the instant case, that the principle in the *Weber* case is not applicable

since the issue here involved is whether Appellants are entitled to prospective increments which have not "yet accrued" and which could only vest in the event of a valid subsisting contract.

Appellants' contention is that just as there was need for enabling legislation in New Jersey, in 1932, to permit local boards to reduce salaries, a similar need exists to validate the resolution of October 14, 1937. By virtue of the authority vested in local boards by the enabling legislation of 1933 to 1936, they paid their employees lesser sums than what they had last received. There was in fact a reduction from "base" salary. That need arose because the State Statute prohibited reductions by local boards, and not because of any contract right. The resolution which is now assailed as invalid did not purport to, nor did it in fact reduce salaries below the highest amounts attained. They merely denied prospective increases. Failure to receive increases prospectively is not repugnant to the State's Statute prohibiting reductions. *Greenway* v. *Camden, supra,* and *Liva* v. *Lyndhurst, supra.* The situation in the cases cited is comparable with the instant case. There is no need for enabling legislation to validate the resolution in question.

In *Phelps* v. *Board of Education of West New York, supra,* this Court held in sustaining the State Courts, that the provisions of Chapter 243 of New Jersey, P. L. 1909, the so-called Tenure Law did not create contracts with individual teachers; but that "the status of tenure teachers while in one sense, perhaps, contractual, is in essence, dependent upon a statute like that of the incumbent of a statutory office, which the Legislature at will, may abolish, or whose emoluments it may change."

This Court is not bound by the decision of a State Court as to the existence and terms of a contract, the obligation of which is asserted to be impaired; but where a statute is

claimed to create a contractual right, we give weight to the construction of the statute by the Courts of the State. *Freeport Water Co.* v. *Freeport,* 180 U. S. 587, 595; *Tampa Water Works Co.* v. *Tampa,* 199 U. S. 241, 243; *Seton Hall College* v. *South Orange,* 242 U. S. 100, 103.

Applying this doctrine results in divesting the Federal question asserted of merit and substance. The distinction asserted by Appellants in their allegation that there is not in issue in the instant case the question of the constitutionality of the Acts of the Legislature such as existed in the *Phelps* case, but, rather, the constitutionality of a resolution of the Appellee which admittedly has not been construed by this Court, is in the language of the Supreme Court of New Jersey, "plainly without substance." The fundamental issue is identical.

Since the Phelps decision, this Court construed the Teachers' Tenure Act of Indiana as creating a contract within the protection of the Contract Clause of the Federal Constitution. In *Indiana* v. *Brand,* 303 U. S. 95, this Court, however, specifically stated that this interpretation was due to the fact that the "Courts of Indiana have long recognized that the employment of school teachers was contractual * * * that no more apt language could be employed to define a contractual relationship than was used by its Legislature in creating its Teachers' Tenure Law * * * that until its decision in the present case, the Supreme Court of the State had uniformly so held * * *; Also that the decision in *Phelps* v. *Board of Education,* 300 U. S. 319, that the Act there considered did not create a contract, is not, authority for a like result here."

Appellants have no vested right in either the provisions of the Tenure Act, or the Rules and Regulations adopted by the Appellee, pursuant to Legislative authority. *Salt Co.* v. *East Saginaw,* 80 U. S. 373; *Ettor* v. *Tacoma,* 228 U. S. 148.

IV.

The statute relied upon by appellants to sustain the appellate jurisdiction of this Court is not applicable for the reason that appellants neglected to invoke the jurisdiction of the highest Court of the State in which a decision could be had. The judgment is not final in the sense that it is subject to review in the New Jersey Court of Errors and Appeals.

> The judicial power shall be vested in a Court of Errors and Appeals in the last resort in all cases as heretofore; • • • Article VI, Section 1, Paragraph 1, of New Jersey State Constitution.

Even though the refusal of the New Jersey Supreme Court to grant a Writ of Certiorari was a discretionary act, and generally matters resting in the discretion of the courts are not subject to review in the appellate courts, nevertheless such is not the rule where there is an abuse of discretion. *State, Newall* v. *Bassett,* 33 N. J. L. 26; *Gaffney* v. *Illingsworth,* 90 N. J. L. 490, 493; *Robinson* v. *Payne,* 99 N. J. L. 135, 142; *Martin* v. *Lehigh Valley R. R. Co.,* 114 N. J. L. 243. It cannot be left to conjecture how the highest Court would have ruled.

The refusal to issue the Writ was not because of statutory prohibition, or judicial limitation, but to the fact that the arguments of appellants were so untenable that they failed to present a debatable question. Appellants now in effect contend that the State Court was arbitrary in so holding and thereby abused its discretion. This was a proper subject matter for review by the State's highest Appellate Court.

This Court has no power to review any other judgments of the Court of a State than those of the highest Court "in which a decision in the suit could be had." *Fisher* v. *Perkins,* 122 U. S. 522.

MOTION TO DISMISS, AND IN THE ALTERNATIVE, TO AFFIRM.

Now comes the Appellee, the Board of Education of the City of Paterson, in the County of Passaic, by John F. Evans, its Counsel, and moves this Court to dismiss, with costs, the Appeal for want of jurisdiction; and, in the alternative, said Appellee moves to affirm the judgment from which the Appeal in the above entitled cause purports to have been taken upon the following grounds:

1. The Federal question was not properly "raised" in the State Courts.

2. The State Court decision was not based on the determination of the Federal question.

3. The questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

4. The Appeal is not from a final judgment of the highest court of the State in which a decision could be had.

HAROLD D. GREEN,
SAUL R. ALEXANDER,
Counsel for Appellee.

JOHN F. EVANS,
Of Counsel With Appellee,
July 18, 1944.

APPENDIX A.

"The salary of a principal or teacher shall not be increased except on the recommendation of the Superintendent and the Committee on Education, and the increases in salary carried with License No. 6 shall become effective on the first of the month following the filing of evidence of the completion of all requirements entitling the teacher to such certificate." Adopted October 27, 1911.*

APPENDIX B.

18:13-5 Revised Statutes of New Jersey:

"Rules governing employment of teachers and principals. A board of education may make rules and regulations not inconsistent with the provisions of this title governing the engagement and employment of teachers and principals, the terms and tenure of employment, the promotion and dismissal of teachers and principals, and the salaries and the time and mode of payment thereof. A board may from time to time change, amend, or repeal such rules and regulations.

The employment of any teacher by a board, and the rights and duties of the teacher with respect to his employment, shall be dependent upon and governed by the rules and regulations in force with reference thereto."

APPENDIX C.

18:13-16 Revised Statutes of New Jersey. (Formerly Chapter 243 P. L. 1909, Sec. 1:)

"The services of all teachers, principals and supervising principals of the public schools, excepting those who are not the holders of proper teachers' certificates in full force and effect, shall be during good behavior and efficiency, after the expiration of a period of employment of three consecu-

* NOTE: This provision was incorporated in the Salary Schedule adopted October 13, 1921, and amended July 14, 1927.

tive calendar years in that district unless a shorter period is fixed by the employing board; or after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year; provided, that the time any teacher, principal or supervising principal had taught in the district in which he was employed on June fifth, one thousand nine hundred and thirty-four, shall be counted in determining such period of employment in that district.

An academic year, for the purpose of this section, means the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation."

APPENDIX D.

18:13-17 Revised Statutes of New Jersey (Formerly Chapter 243 P. L. 1909, Sec. 1)

"No teacher, principal, or supervising principal under the tenure referred to in section 18:13-16 of this title shall be dismissed or subjected to a reduction of salary in the school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary or clerk of the board of education having control of the school in which the service is being rendered, and after the charge has been examined into and found true in fact by the board of education upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of the school board or not."

APPENDIX E.

Resolution of the Board of Education of the City of Paterson, in the County of Passaic, adopted Oct. 14, 1937.

"Resolved, that all resolutions heretofore adopted and approved by the Board of Education, providing

for a reduction in the basic salary of the officers and employees of the Board of Education be rescinded as of October 1, 1937, and be it further

Resolved, that on and after October 1, 1937, all officers and employees be paid the base salary in accordance with the terms of their employment, providing the aforesaid officers and employees waive all claims, demands, damages or liabilities, which they have had or now have for or on account of any and all reductions made or affected prior to said October 1, 1937."

(3220)